BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application regarding the Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates	NO. G02-45 HOSPITAL ASSOCIATIONS' SUPPLEMENT TO JOINT REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

In accordance with the Commissioner's Case Management Order of October 24, 2002, the Washington State Hospital Association ("WSHA") and the Association of Washington Public Hospital Districts ("AWPHD") (hereinafter "the hospital associations") submit this individual supplement to the Joint Reply to OIC Staff Response and Premera Opposition to Motions to Intervene.

I. Introduction & Summary

The Commissioner's staff has taken the position that intervention status should be granted to the hospital associations and others, but suggests that the Commissioner impose a number of restrictions on the intervenors. Premera, consistent with its previous attempts to minimize scrutiny of the proposed conversion, argues that none of the proposed intervenors should be allowed to participate in the adjudicatory hearing. The hospital associations will address Premera's arguments first, and will show that they are based on a

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misreading of the applicable statutes, and a series of unsupported assumptions about the intervenors' intent and the ability of the Commissioner to manage the proceedings. We will then address the staff's suggested restrictions on the intervenors, and will show that while the hospital associations remain committed to efficient proceedings and cooperation with provider groups and other applicant-interveners wherever possible, the requested restrictions are premature, and in some respects unworkable.

II. Response to Premera

A. Premera has created criteria for intervention not found in the applicable statutes.

Premera's principal argument is that, in order to grant intervenor status, the Commissioner must find that a movant's interest is "different from that of the public in general and is [not] already represented by the public agencies such as the OIC and Attorney General." Premera Opp. at 3. This standard, which is expressly rejected by the Commission staff (OIC Staff's Response at 12), has no basis in the applicable statutes. The only requirements for intervention under RCW Chapters 48.31B and 48.31C are that the intervenor has a "significant interest" that is "determined by the commissioner to be affected." RCW 48.31B.015(b) and RCW 48.31C.030(4). The acts grant such a person the right to "present evidence, examine and cross-examine witnesses, and offer oral and written arguments, and in connection therewith may conduct discovery proceedings in the same manner as is allowed in the superior courts of this state." *Id.*

Because these proceedings are subject to Title IV of the Administrative Procedure Act, RCW 34.05.443(1) also applies, although this general statute cannot be applied so as to nullify the specific provisions of the Holding Company Acts. *General Tel. Co. of*

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Northwest, Inc. v. Utilities & Transp. Comm'n, 104 Wn.2d 460, 464, (1985). Under the APA, the Commissioner is to consider whether intervention is in the interests of justice and will impair the conduct of the proceedings. In the Holding Company Acts, the legislature has already determined that it is in the public interest for persons whose significant interests may be affected by the proposed conversion to be allowed to intervene. Therefore, the only additional criterion imposed by the APA is whether intervention will impair the orderly and prompt conduct of the proceedings.

The latter criterion cannot be read to mean that intervention should be denied if the participation of additional parties will complicate or delay resolution of the matter in any fashion. If that were the standard, intervention would never be allowed. Rather, the Commissioner should consider the inherent complexity of the case, the magnitude of the intervenors' interests, the likely affect of intervention, and the ability to minimize complications and delay through case management techniques.

Premera's reliance on UTC's decision in *In re US West Communications, Inc.*, No UT 951425, 1997 Wash. UTC Lexis 26 (1997), is misplaced simply because that matter did not involve application of the same statutory criteria as are applicable here under the Holding Company and Health Carrier Acts. Similarly, the Wisconsin OIC's unpublished oral ruling applied general standing principles under its APA—which even Premera acknowledges to not apply to these motions[1]—rather than the specific statutory criteria provided under Washington law. *See http://oci.wi.gov/bcbsconv/ah112999.pdf (visited 12/14/02)*. Furthermore, Premera has neglected to mention that, subsequent to this oral

[1] *See* Premera Opp. at 38.

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ruling, the Wisconsin Commissioner allowed the intervenors in that matter to file briefs, cross-examine and present witnesses at the adjudication, as well as granted discovery of the Commissioner's consultants. *In the Matter of the Application for Conversion of Blue Cross & Blue Shield United of Wisconsin*, Wisconsin OIC No. 99-C26038, Findings of Fact, Conclusions of Law & Order (available at http://oci.wi.gov/bcbsconv/bcbsdec.pdf) (visited 12/16/02).

B. The Hospital Associations have significant interests that are affected by these proceedings.

The interests of the hospital associations, which are affected by these proceedings, have been described in detail in earlier filings. To summarize, hospital association members are both major providers of health care to Premera subscribers and purchasers of health insurance. If, as is being studied by the Commission staff, the profit motive would result in higher premiums, decreased reimbursements, and withdrawal from less profitable markets or lines, hospitals would be significantly affected. Reduced payments, increases in uncompensated care, or increased health insurance costs will jeopardize the financial viability of hospitals and, in turn, have negative effects on health care consumers.

In addition, Premera's stated reason for conversion is increased access to capital, which would likely fund further expansion. If this initiative results in further consolidation of the health care insurance market, the anti-competitive effects of consolidation will be felt directly by hospitals and other providers. Finally, many member hospitals may have corporate rights that will be impaired if the proposed conversion is approved.[2] It is

[2] The hospital associations agree with Premera that the dispute over the validity of Premera's by-law amendments is a matter for the courts and is not part of these proceedings. Assuming (as is likely) that hospitals seek judicial relief, that would not diminish their interests in this proceeding as described above.

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difficult to imagine any organizations, other than the company and its subscribers, whose interests are more significantly at stake in these proceedings.

For the most part, Premera does not contest the proposition that these interests will be affected by the outcome of these proceedings. Instead, it relies on the erroneous proposition that it is sufficient to say that these interests will be adequately protected by the OIC staff. As demonstrated above, this argument is legally and factually[3] unsupported. Additionally, Premera characterizes the hospitals' interests as "special," rather than "significant," and then assumes, without explanation, that this semantic distinction is a sufficient basis to deny intervention. Premera Opp. at 28.[4]

In making this argument, Premera poses an irrelevant question and then answers it. The relevant point is that, regardless of whether the hospitals' interests are "special," they are also "significant," both in terms of the statutory criteria that the Commissioner is required to consider and the potential impact on hospitals. If conversion decreases the availability or leads to higher cost of health care coverage (RCW 48.31C.030(5)(a)(ii)(B)(II) and RCW 48.31C.030), or is otherwise prejudicial to the insurance-buying public (RCW 48.31C.030(5)(a)(ii)(C)(IV), there will be a direct negative effect on hospitals as a result of increases in uncompensated care and increased costs of insurance for employees. If conversion will lead to consolidation or monopolization of the health insurance market (RCW 48.31C.030(5)(a)(ii), hospitals will suffer in terms of

[3] The staff does not claim to protect the interests of hospitals. *See* OIC Staff Resp. at 12.

[4] The single case Premera cites in support of this argument, *Cole v. Washington Utilities & Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971) is of no help. It involved application of an entirely different statutory test and stands for nothing more than the proposition that a party who is not a customer of the regulated entity and does not otherwise have a substantial interest in a UTC proceeding does not have a right to intervene under the UTC's rules. 79 Wn.2d at 305-06.

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decreased reimbursements, reduced bargaining power and increased premiums. In addition, if conversion is approved but does not result in transfer of 100% of the net asset value of not-for-profit Premera to a organization having a substantially similar purpose, hospitals will be affected because assets that would otherwise have been devoted to providing health insurance on a not-for-profit basis will have been diverted to the for-profit entity, or to an entity not having a substantially similar purpose.[5]

C. Premera's "chaos" claim is unfounded.

Relying on RCW 34.05.443(1), Premera argues that participation by the intervenors would "invite chaos." Premera Opp. at 41. This claim is unfounded. The hospital associations will not create chaos, nor do they believe that any other proposed intervenor has such a goal. Equally unfounded is the underlying assumption that each of the proposed intervenors has unlimited interest, ability and resources to pursue every issue bearing on conversion. The simple economics of this effort require that the intervenors narrowly focus

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[5] Despite the fact that the issue of compliance with RCW 24.03.225-230 is not before the Commissioner, Premera has devoted considerable attention to denying that it is a not-for-profit corporation with a charitable purpose. This denial is clearly intended to avoid application of the requirements of RCW 24.03.225 and common law that the "assets" of a dissolved charitable corporation must be distributed to another not-for-profit organization with a "substantially similar" purpose. Premera's stock-transfer scheme clearly fails this requirement because it would leave the assets in the hands of a for-profit corporation. The stock would not be convertible to 100% of the asset value because, by the time it could be sold, the new for-profit entity will have diluted its value by issuance of additional stock.

Under RCW 24.03.230, approval of the Attorney General is required only as a condition of adoption of a plan for distribution of the assets of a not-for-profit corporation which is subject to RCW 24.03.225(3), *i.e.* if it has "charitable, religious, eleemosynary, benevolent, educational or similar purposes." Approval of the Attorney General is not required under any other circumstance. *Id.* Because Premera clearly does not have a religious or educational purpose, and because "eleemosynary," and "benevolent" are synonyms for "charitable," it is clear that Premera is, or at least must be viewed as, a corporation with a "charitable" purpose under RCW 24.03.225(3). Having sought AG approval under RCW 24.03.230, Premera is estopped to deny that it is subject to requirements pertaining to charitable corporations.

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their efforts. The intervenors have already shown that they are willing to coordinate efforts, eliminate redundant efforts and minimize costs.

Premera also assumes that the Commissioner, and the legal staff, would be incapable of exercising control over the intervenors. The record to date belies this assertion. Intervenors have been directly responsive to concerns expressed by the staff about redundant efforts and have committed to minimize the same. The intervenors also acknowledge that the Commissioner is authorized to impose reasonable and appropriate limits on their participation.

III. Response to OIC Staff

The staff has proposed several very significant conditions on the intervenors' participation, which are discussed specifically below. In general, the hospital associations believe that these conditions are premature and potentially unnecessary because the parameters of this proceeding are not clear. Until the consultant reports are issued and the position of the OIC staff is known, it is impossible to know to what extent the hospital associations will be obliged to participate in the actual hearing, including what experts or other evidence they may wish to present. Similarly, until they know whether, or to what extent, they will be allowed access to the materials being considered by the staff and consultants,[6] it is impossible for the hospital associations to say what additional discovery they will need.

Therefore, while the hospital associations assert their right to full participation in the adjudication, as the Holding Company acts provide, that does not mean that they will

[6] The hospital associations will agree to imposition of a reasonable protective order with respect to such materials.

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not agree to reasonable conditions on their participation, or that such conditions cannot be imposed later. Therefore, rather than impose a set of unnecessary restrictions at this point, the Commissioner should grant intervention, and then (as the staff suggests) direct the intervenors to meet and confer with the parties to develop a plan for efficient management of the proceeding. If any party or intervenor is dissatisfied with the results of that process, the Commissioner would be in a position to resolve that particular issue, rather than impose broad-brush restrictions.

A. Creation of a single "Provider Group"

The staff argues that the intervenors should be divided into two groups and that each group should be required to designate one "attorney-in charge." This condition is unnecessary and unworkable. The hospital associations, the WSMA, the Community and Migrant Health Clinics, and the University of Washington School of Medicine each has separate counsel. Premera has already accused WSMA of violating anti-trust laws in its approach to this case. Premera has also suggested that the hospital associations and other providers seek access to proprietary information, not for purposes of meaningful participation in these proceedings, but for their own self-interests. It further implies it may make antitrust allegations against provider groups in the future. See Premera Opp. at 34. This situation makes it effectively impossible for the two major provider groups to be represented by a single lawyer or law firm. The proposal is also unworkable because it does not account for conflicts of interest engendered by joint representation, which are prohibited by the Rules of Professional Conduct, nor does it account for the economic realities facing the proposed intervenors.

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The Commissioner's acknowledged authority to limit multiple examination, redundant presentation of witnesses and to otherwise manage discovery and the hearing is more than sufficient to address the staff's concerns. Requiring the intervenors to give up representation by their counsel of choice is not reasonable nor permitted under these circumstances.

B. Proposed Limits on Depositions and Interrogatories

The staff's alternative suggestion that "all parties" be limited to taking depositions upon written motion and showing of good cause would unnecessarily burden the Commissioner and the parties. A more sensible approach is to allow a party to object to the taking of any deposition, so that the Commissioner will only have to resolve matters truly in dispute.

The proposed 25 interrogatory limit may, or may not, make sense depending on the level of investigation previously undertaken by the staff and the access intervenors are given to that information. This issue would best be resolved after the parties and the intervenors have more information about the parameters of the proceeding.

IV. Conclusion

For the foregoing reasons, WSHA and AWPHD's Motion to Intervene should be granted. Hospital associations and other applicant-interveners have demonstrated willingness and ability to work together wherever possible including preparation of joint briefing and argument on Premera's objection to the Commissioner's First Order: Case Management Order and joint briefing on the reply to Premera's Opposition to Motions to Intervene. Hospital associations plan to continue these efforts

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wherever possible, including combined briefing and discovery, where appropriate. They will endeavor to work not only with other provider groups but consumer and Alaska groups as well. However, for the reasons cited above, these efforts at collaboration must remain largely informal, allowing for proper representation of hospital association and other applicant-interveners' interests and avoiding potential violations of the Rules of Professional Conduct.

Respectfully submitted this 18th day of December, 2002.

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